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No. 05-1600

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In The

Supreme Court of the United States

JACQUELINE ALLEN,

Petitioner,

v.

CHRISTOPHER ALLEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit erred by holding that a claim for an assault and battery is dischargeable in a Chapter 13 bankruptcy when §1328(a) of the Bankruptcy Code requires the bankruptcy courts to grant discharge of all debts including claims for willful and malicious injury.

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I.

COUNTER-STATEMENT OF THE CASE

In 1999, Christopher Allen ("respondent") filed a Chapter 13 bankruptcy. Pet. App. 5a. Before filing, his ex-wife, Jacqueline Allen, ("petitioner") had sued him for personal injuries resulting from an assault and battery. *Id.* Also at the time of filing, the Internal Revenue Service was engaged in collection activities for unpaid income tax liabilities. The Chapter 13 plan proposed to pay respondent's income tax liability in full, a spousal maintenance and support obligation to petitioner in full, with a small balance paid to general unsecured claims including the assault and battery claim of the petitioner.

In December 1999, respondent's Chapter 13 plan was confirmed over the objection of the petitioner. *In re Allen*, 241 B.R. 710 (Bankr. D. Mont. 1999). The bankruptcy court concluded that the plan was proposed in good faith because respondent was working in his profession and providing substantial spousal maintenance to petitioner as part of his plan; all of respondent's projected disposable income based on his present employment was committed to the plan; the respondent was seeking to repay a substantial tax claim and wishing to avoid the future litigation expense of petitioner because she had not accepted the divorce decree in California and she was seeking "more litigation to continue that acrimonious fight." *Id.* The bankruptcy court found that substantial payments were being made under the plan, mostly to the benefit of the IRS and one other unsecured priority creditor, petitioner's divorce counsel. *Id.* The Ninth Circuit Court of Appeals affirmed on January 11, 2002. *Allen v. Allen*, 23 Fed. Appx. 859 (9th Cir. 2002). The Ninth Circuit held the bankruptcy court's finding of good faith was not clearly erroneous:

> Finally, Jacqueline asserts that Christopher's abusive conduct toward her evinces his bad faith in proposing the Plan. As noted above, however, there has been no judicial determination with respect to Jacqueline's personal injury claim. Good faith is determined on the basis of the totality of the circumstances. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390-91 (9th Cir. 1982). The bankruptcy court found that Christopher proposed his Plan in good faith because Christopher committed all of his projected disposable income to the Plan, sought to repay substantial tax claims, and sought to avoid litigation expense. The bankruptcy court's finding of good faith was not clearly erroneous.

Allen, 23 Fed. Appx. at 860-861.

Before the respondent's plan was confirmed, the petitioner had filed two adversary complaints in the bankruptcy court: one, objecting to the respondent's discharge of petitioner's assault and battery claim; and the second requesting a liquidation of her assault and battery claims. The bankruptcy court referred the liquidation of petitioner's assault and battery claim to the United States District Court for the Central District of California in accordance with 28 U.S.C. §157(b)(5) (which in turn referred it to California State Court); it stayed further action on the petitioner's objection to discharge; and it considered confirmation of the respondent's proposed Chapter 13 plan.

In March 2002, petitioner obtained a default judgment against respondent in the State of California Superior Court for $1,289,036. Despite the liquidation of her claim, petitioner did not notify the bankruptcy court of the claim. Two years later, as respondent was near completion of his

Chapter 13 plan, the bankruptcy court requested a status report on the liquidation of petitioner's claim and scheduled a trial on the petitioner's objection to discharge which had previously been stayed. For the first time, petitioner advised the bankruptcy court of the California state court judgment. At the trial on the objection to discharge claim, the bankruptcy court determined that the petitioner's assault and battery claim was dischargeable under 11 U.S.C. §1328(a).

Petitioner did not seek modification of respondent's Chapter 13 plan under 11 U.S.C. §1129(a) after the liquidation of her claim, nor did she seek further relief based upon her current allegations that respondent lacked good faith. Rather, petitioner proceeded only in her objection to discharge the adversary proceeding and appealed the bankruptcy court judgment of discharge which was affirmed by the Ninth Circuit. *Allen v. Allen*, 163 Fed. Appx. 598 (9th Cir. 2006). She now seeks a Writ of Certiorari of that affirmance.

Although petitioner seeks review of the judgment of dischargeability, she argues that confirmation of the respondent's Chapter 13 plan was in error because respondent lacked good faith. These arguments are waived, however, because petitioner never raised the issue of good faith after her assault and battery claim was liquidated and she never requested the bankruptcy court to revisit its good faith determination in light of her liquidated claim. Both the district court and the Ninth Circuit recognized the good faith issue was not timely nor properly brought to the bankruptcy court's attention. The district court stated:

> As noted above, the Bankruptcy Court, U.S. District Court, and the Ninth Circuit Court of Appeals all reviewed the Chapter 13 Plan and

> agreed that it should be confirmed. The only event which has occurred since the review of the Plan is that Jacqueline's civil suit has been reduced to judgment. Once judgment was entered, Jacqueline could have moved to modify the Plan pursuant to 11 U.S.C. §1329. However, Jacqueline failed to do so. Thus, this Court has no basis for revisiting the confirmation of the Plan, even given the fact that Jacqueline's civil suit has been reduced to judgment since the Plan was confirmed.

Allen v. Allen, ftnt. 1 (04-35); Pet. App. 9a.

The Ninth Circuit agreed:

> However, the issue of good faith was not timely and properly brought to the bankruptcy court's attention.

Allen v. Allen, 163 Fed. Appx. 598 (9th Cir. 2006).

II.

STATUTORY BACKGROUND

Before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8, 119 Stat. 23, a Chapter 13 bankruptcy debtor completing a confirmed Chapter 13 plan was entitled to a "super discharge" discharging, among other things, claims based upon willful and malicious injuries, such as the assault and battery claims of the petitioner. 11 U.S.C. §§1328(a), 523(a)(6).[1] Although a "willful and malicious injury by the

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[1] The Bankruptcy Abuse Prevention and Consumer Protection Act added a new exception to the §1328(a) discharge:

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debtor to another entity" may not be discharged under Chapter 7, it was formerly discharged if the debtor met the requirements under Chapter 13. *See* 11 U.S.C. §1328(a).

To obtain a super discharge, a Chapter 13 debtor must first obtain confirmation of a Chapter 13 plan and then must complete the payments under that plan. 11 U.S.C. §1328(a). One of the statutory criteria for confirmation of a proposed Chapter 13 plan is that it must be proposed "in good faith." 11 U.S.C. §1325(a)(3).

Congress has the constitutional authority to enact bankruptcy laws. Constitution, Art. I, §8, Cl.4. When it does so, the affect on property rights is generally prospective only; that is, if the bankruptcy law eliminates a property right it will do so only to those property rights otherwise arising after enactment of the bankruptcy law. *United States v. Security Industrial Bank et al.*, 459 U.S. 70, 81 (1982).[2] The substantive powers of Congress are subject to the Fifth Amendment; under its bankruptcy powers Congress is not prohibited from impairing the obligations of contracts. An equitable adjustment of creditor's claims by way of reorganization may be regulated by bankruptcy law if the statute is "consonant with a fair, reasonable, and equitable distribution of those assets." *Kurhner v. Irving Trust Co.*, 299 U.S. 445, 452 (1937).

"(4) for restitution, or damages awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to the individual or the death of an individual."

P.L. 109-8 §314(b).

[2] Here, petitioner's claim arose in 1996 well after the enactment of the Bankruptcy Code in 1978.

Congress, in accordance with its bankruptcy power, enacted bankruptcy laws allowing a discharge of personal injury claims, along with nearly all other liabilities, in a Chapter 13 case. This Court has already upheld the Chapter 13 super discharge scheme. *Pennsylvania Dept. Public Welfare v. Davenport*, 495 U.S. 522 (1990).

In *Davenport*, the petitioner challenged a Chapter 13 discharge of a criminal restitution order. This Court adhered to the Congressional policy choice to allow a discharge of restitution order, citing 5 Colliers on Bankruptcy p. 1328.01[1][e] (15th Ed. 1986):

> [T]he dischargeability of debts in Chapter 13 that are not dischargeable in Chapter 7 represents a policy judgment that [it] is preferable to debtors to attempt to pay such debts to the best of their abilities over three years rather than for those debtors to have those debts hanging over their heads indefinitely, perhaps for the rest of their lives.

Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. *supra* at 563. This Court found Congress clearly intended to limit exceptions to discharge in Chapter 13 cases. *Id.*

III.

REASONS FOR DENYING THE PETITION

A. The Circuits Are Not Divided as to the Dischargeability of a Assault and Battery Claim in a Chapter 13 Case.

The interplay between the former Bankruptcy Code §1328(a) and §523(a)(6) makes it clear that claims arising from willful and malicious injuries were dischargeable in Chapter 13 bankruptcies. All of the courts of appeal that

have considered the issue have uniformly held that a claim, such as asserted by petitioner, is dischargeable through §1328(a). *In re Coldwell,* 895 F.2d 1123 (6th Cir. 1990); *Mason v. Young (In re Young)*, 237 F.3d 1168 (10th Cir. 2001); *Massa v. Addona (In re Massa*), 187 F.3d 292 (2nd Cir. 1995); *Solomon v. Solomon (In re Solomon)*, 67 F.3d 1128 (4th Cir. 1995); *Handeen v. LeMaire (In re LeMaire*), 898 F.2d 1346 (8th Cir. 1990); *In re Rasmussen,* 888 F.2d 703 (10th Cir. 1989). The Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuit courts of appeal all agree that the Chapter 13 super discharge includes claims arising from willful and malicious injuries. All circuit courts of appeal that have considered the dischargeability of a claim arising from a willful and malicious injury, including an assault and battery claim, have held that such claims are subject to the Chapter 13 super discharge. No court of appeals has ruled otherwise.

B. Petitioner Has Waived Any Argument Relating to a Determination of Good Faith.

In her brief, petitioner argues that respondent did not prosecute his modified chapter 13 plan in "good faith," an argument she failed to raise after her claim was liquidated. Pet. Br. 12. Under the doctrine of waiver, however, petitioner cannot assert an argument in this Court that she failed to raise previously. *See, e.g., Cooper Indus. v. Avaiall Servs. Inc.*, 543 U.S. 157, 168-69 (2004) ("We ordinarily do not decide in the first instance issues not decided below."); *Spretsma v. Mercury Manne*, 537 U.S. 51, 56 n. 4 (2002) ("Because this argument was not raised below, it is waived."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument

because respondent failed to address it below. . . ."); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984).

In this case, Petitioner waived her "good faith" arguments because she did not raise that issue after her claim had been liquidated; she did not return to the bankruptcy court requesting relief from the Chapter 13 plan confirmation based upon respondent's lack of good faith. Petitioner could have requested the Chapter 13 plan be modified or dismissed in light of her liquidated claim; she did not. Consequently, there is no ruling from the bankruptcy court regarding respondent's good faith in light of the liquidated claim and there is no evidentiary record by which the bankruptcy court's good faith determination – which it did not revisit because it was not requested to – can be evaluated.

Here, petitioner is asking this Court to either determine that the bankruptcy court committed clear error, although it was not requested to reconsider its good faith determination, or to adopt a rule in the utter absence of any evidentiary background. The respondent's good faith is not a consideration in the issue framed in the adversary complaint from which this case flows. Good faith is a confirmation issue and has nothing to do with the adversary judgment in this case.

Even if this Court decides to hear this issue for the first time on appeal, it should consider the three primary factors in allowing issues to be raised for the first time in this Court: (1) whether there is a material change in the law; (2) whether assertion of the issue would have been futile; and (3) whether an important public interest is served by allowing consideration of the issue. *Standard Industries, Inc. v. Tigett Industries, Inc.*, 397 U.S. 586, 587-88 (1970)

(per curiam). In this case, there has been no material change in the law respecting the good faith of a Chapter 13 debtor; there is no contention that presenting this issue to the bankruptcy court would have been futile nor is there any important public interest served by consideration of this issue because the Bankruptcy Code has been amended.

C. Even If Petitioner Had Raised the Good Faith Issue, There Is No Split Among the Circuits in the Determination of Good Faith.

The Bankruptcy Code expressly requires a finding of the debtor's good faith in proposing a Chapter 13 plan. 11 U.S.C. §1325(a)(3). The courts of appeal are uniform in holding that the good faith determination is made by consideration of a variety of the circumstances. Although articulated differently, the courts of appeal adhere to a common analysis of good faith. The Eighth Circuit looks at the "totality of the circumstances" aided by consideration of eleven factors: (1) amount of the payment; (2) debtor's employment history; (3) the duration of the plan; (4) accuracy of the debtor's schedules; (5) extent of preferential treatment between classes; (6) extent of modification of secured claims; (7) type of debt and dischargeability of debt; (8) special circumstances; (9) frequency of bankruptcy filings; (10) motivation and sincerity of debtor; and (11) burden of administration on trustees. *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d *supra* at 1348-49.

The Tenth Circuit has adopted essentially the same factors. *Robinson v. Tenants (In re Robinson)*, 987 F.2d 665, 668 n. 6 (10th Cir. 1993).

Nearly identical factors are adopted in the Sixth Circuit Court of Appeals, *Society National Bank v. Barrett (In re Barrett)*, 964 F.2d 588, 592 (6th Cir. 1982) ("(1) the debtor's income; (2) the debtor's living expenses (3) the debtor's attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earnings; (7) any special circumstances the debtor may be subject to, such as usually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.")

The Ninth Circuit uses a case by case analysis considering whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed a plan in a inequitable manner. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982).

Although the circuits do not articulate precisely the same factors, there is commonality among the factors applied by all of them. There is no split among the circuits as to whether the dischargeability of a debt is, or is not, a factor to be considered. While the Ninth Circuit has not expressly identified dischargeability as a factor, it falls within the ambit of "unfair manipulation of the Bankruptcy Code." In fact, the bankruptcy court here expressly considered the dischargeability of the petitioner's claim as a factor in its good faith analysis. *In re Allen*, 241 B.R. *supra* at 717.

No courts of appeal have ruled that the dischargeability of a debt is not a factor; indeed all of the good faith analyses announced by the courts of appeal appear consistent on this issue. There is no split among the circuits on the good faith analysis.

D. This Case Does Not Raise an Issue of Continuing Significance.

The super discharge formerly provided by Chapter 13 was eliminated through the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. That act effected amendments to §1328 of the Bankruptcy Code such that after the effective date of that act, October 17, 2005, P.L. 109-8 §1501, claims for willful and malicious injury are no longer discharged in Chapter 13. *Id.* at §314(b); *See* 11 U.S.C. §1328(a)(4). The issue raised by petitioner will have no effect on bankruptcy cases filed after October 17, 2005.

E. Petitioner Seeks Relief Contrary to the Express Will of Congress.

Petitioner argues that this Court should adopt a new rule contrary to statute. She asks this Court to hold that the good faith requirement of §1325(a)(3) of the Bankruptcy Code can never be met when the result will discharge a willful and malicious injury claim. Petitioner argues that this Court "as a matter of sound social policy" should adopt a uniform nationwide standard that is contrary to the plain language of the Bankruptcy Code. Pet. Br. 20.

This Court is unwilling to "soften the impact of Congress' chosen words even if [the Court believes] the words lead to a harsh outcome . . . " *Lamie v. United States*

Trustee, 240 U. S. 526, 538 (2004); it is not the function of the courts to create "public policy" but to enforce a statute "according to its terms." *United States v. Ron Pain Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Cominetti v. United States*, 242 U.S. 470, 485 (1917)). *See also Hartford Underwriter Insurance Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000).

This Court should not enact a public policy, no matter how laudable such a policy might be, that is contrary to the clear language of a statute. The requested result would nullify the express intention of Congress that such claims be included within the scope of the Chapter 13 super discharge. If a Chapter 13 plan can never be proposed in good faith if it results in the discharge of a willful and malicious injury claim, then a Chapter 13 debtor could never obtain a discharge of such claims even though the former Code §1328(a) clearly provided for discharge. Such a construction would render the discharge of willful and malicious injuries provided by §1328(a) as surplusage. This Court has expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. *supra* at 562. What petitioner actually seeks is a ruling imposing this Court's view of what would constitute "sound social policy" and thereby override the express will of Congress.[3]

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[3] Indeed, all of the petitioner's arguments supporting her "sound social policy" are factors under the existing good faith analyses. Petitioner identifies income (by reference to respondent's occupation as a physician), low pro rata payment of petitioner's claim, and dischargeability of her claim. Petitioner characterizes the result as a "miscarriage of justice." Yet, the good faith analyses required in order to obtain

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Petitioner asks this Court to change Congress' clear statutory scheme even though this Court has clearly stated it will not do so:

> In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome – if what petitioner urges is that – is a task for Congress, not the courts. [Citing authority].

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. *supra* at 13-14.

F. Procedural Defects Make this Case a Poor One Upon Which to Create a National Standard.

Petitioner appeals from the entry of a judgment of dischargeability filed in an adversary proceeding. The only issue before the bankruptcy court was whether the petitioner's willful and malicious injury claim was subject to a Chapter 13 discharge. Given the unambiguous statutory language, the bankruptcy court properly found the claim dischargeable.

Petitioner seeks certiorari in a case where the issue to ultimately be addressed, e.g., the respondent's good faith, was not raised and would not have been a proper issue even if raised. There is no ruling from the bankruptcy court on the issue of good faith and no evidentiary record by which to analyze the good faith issue.

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confirmation of a Chapter 13 plan require consideration of these very issues.

G. The Decision Below Is Correct.

The Courts of Appeals, including the Ninth Circuit, are correct in holding that an assault and battery claim against a debtor is dischargeable under Chapter 13. *Allen v. Allen*, 163 Fed. Appx. 598. The applicable version of 11 U.S.C. §1328(a), providing for discharge of debts, rendered debts related to willful and malicious injury caused by the debtor dischargeable in a Chapter 13 bankruptcy. In this case, the Ninth Circuit was also correct in holding that the issue of good faith was not timely nor properly brought to the bankruptcy court's attention. *Id.* There is no basis for this Court to review this correct determination.

IV.

CONCLUSION

Petitioner has advanced no justification for this Court's exercise of certiorari jurisdiction. There are no conflicting decisions on either the dischargeability of willful and malicious injuries or on the determination of good faith. Further, due to revisions to the Bankruptcy Code, the issue presented by the petitioner has little or no continuing significance beyond this case. Petitioner's good faith issue presented to this Court was not raised in the bankruptcy court. Finally, petitioner requests this Court to enter a ruling contrary to the clear will of Congress and upon a procedural background absent of evidence.

The respondent, Christopher Allen, respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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